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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-851

LYNN SEEBER, GENERAL MANAGER OF THE TENNESSEE VALLEY AUTHORITY, ET AL., PETITIONERS

v.

STATE OF ALABAMA AND ALABAMA AIR POLLUTION CONTROL COMMISSION, EX REL. WILLIAM J. BAXLEY, ATTORNEY GENERAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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In this case petitioners, the Tennessee Valley Authority, the United States Army and their various officers and agencies (hereinafter referred to as "TVA" and "the Army"), seek a review of the judgment of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit held that Section 118 of the Clean Air Act of 1970, 84 Stat. 1678. 1689, as renumbered and amended, 42 U.S.C. 1857f, requires that TVA and the Army comply with the Alabama Air Pollution Control Rules and Regulations requiring a written permit for the operation of facilities and equipment causing air polution located within the State of Alabama.

The history of this case may be summarized as follows: On October 20, 1972, the State of Alabama and the Alabama Air Pollution Control Commission (hereinafter referred to as "Alabama" and "the Commission") filed

an action for declaratory and injunctive relief in the United States District Court for the Northern District of Alabama. The complaint alleged, first, that TVA and the Army were required by Section 118 of the Clean Air Act of 1970 to obtain written permits from the director of the Alabama Air Pollution Control Commission, for the operation of their air polluting facilities and equipment within the state; and, second, that TVA and the Army refused to obtain such permits for their facilities.

The case was submitted to the District Court on the following motions: a motion for summary judgment filed by Alabama and the Commission, a motion to dismiss filed by the Army, and a motion to dismiss or in the alternative for summary judgment filed by TVA. The District Court in its judgment granted the motions filed by TVA and the Army and denied the motion of Alabama and the Commission.[1]

Alabama and the Commission then appealed the case on June 28, 1973, to the United States Court of Appeals for the Fifth Circuit, which reversed the judgment of the District Court and held, one judge dissenting, that "federal facilities are subject to the Alabama permit requirement." Alabama and the Commission firmly believe that the decision of the Fifth Circuit is correct.

Nevertheless, Alabama and the Commission do not oppose the granting of the petition for a writ of certiorari because they consider the issue posed in this case to be one of great national importance. For example, a sister state, the Commonwealth of Kentucky, filed an action, involving essentially the same issues as those in the present case, against federal installations located in Kentucky. On appeal of the Kentucky case, the United

[1] In the District Court, Alabama and the Commission sued also the Environmental Protection Agency and its officers. The District Court dismissed the complaint as to them and Alabama and the Commission did not appeal from that dismissal.

States Court of Appeals for the Sixth Circuit rendered an opinion in direct conflict with that of the Fifth Circuit. The Sixth Circuit in *Kentucky v. Ruckelshaus*, 497 F. 2d 1172 (C.A. 6, 1974), stated that Section 118 of the Clean Air Act of 1970, while requiring that federal facilities comply with substantive state air pollution requirements, does not require that they comply with state permit requirements. The Kentucky case is now up for possible review in this Court on a petition for a writ of certiorari in *Kentucky v. Train*, No. 74-220.

Furthermore, many other states have faced similar recalcitrance to their permit requirements from federal facilities located within their borders, and some have also initiated court action against these facilities.[2]

Therefore, because of the widespread state interest in the issues posed in this case, respondents Alabama and the Commission offer no objections to a review in this Court of the opinion of the Fifth Circuit, along with that of the Sixth Circuit and those of any other Circuits which may come before this Court.

RESPECTFULLY SUBMITTED,

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[2] Amici curiae filing briefs in support of Alabama in the Fifth Circuit included the States of California, Kentucky, Maine, New York, Ohio and Texas. And see *California v. Stastny*, No. 72-2905, C.A. 9, appeal docketed November 6, 1972; *Illinois v. Department of Defense*, N.D.III., Civ. No. 74-C-3122(Joliet Arsenal air case); *United States v. Pennsylvania Environmental Hearing Board*, M.D. Pa., Civ. No. 73-454; and *Chattanooga-Hamilton County Air Pollution Control Board v. ICI-Atlas*, E.D. Tenn., Civ. No. 6581 (Volunteer Arsenal air case).